

E-FILED on: 1/21/2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re: CORRINA CURIEL LONA,
Debtor.

No. C-08-03563 RMW

[Re Docket Nos. 8, 14]

CORRINA CURIEL LONA,
Appellant,

ORDER GRANTING EXTENSION OF TIME
TO FILE APPEAL BRIEF

v.

JOSE ABREU dba INTERTEL
COMMUNICATIONS,

Appellee.

Debtor Corrina Curiel Lona appeals from a bankruptcy court order after trial overruling Lona's objection to appellee Jose Abreu dba Intertel Communications claim against her in the amount of \$439,000. Shortly after beginning the appellate process, Lona decided to represent herself. *See* Docket No. 3 (Aug. 4, 2008). This change in counsel may have led to Lona's failure to receive the clerk's notice setting a briefing schedule for the appeal.¹ The briefing schedule called for

¹ The court's records, however, suggest that a copy of the briefing schedule was mailed to Lona's present address. *See* Docket No. 7 Service Receipt (Oct. 7, 2008).

1 Lona's opening brief to be due on November 6, 2008. Docket No. 7 (Oct. 7, 2008). It also set
2 deadlines in November and December for Abreu's opposition brief and any reply briefing. *See id.*

3 Lona failed to file her opening brief on appeal. On December 11, Abreu moved to dismiss
4 the appeal for failure to prosecute. Upon receipt of Abreu's motion to dismiss, Lona claims that she
5 became aware of the briefing schedule. Thus, on December 31, 2008, Lona filed a motion for an
6 extension of time to file her opening brief, which the court also construes as an opposition to the
7 motion to dismiss. The court has reviewed the papers and determined that this matter can be
8 determined without oral argument. *See* Civil L.R. 7-1(b).

9 The failure to comply with the court's briefing order may justify dismissal of an appeal.
10 Bankr. R. 8001; *In re Scheri*, 51 F.3d 71, 74 (7th Cir. 1995). Nonetheless, the case law is clear that
11 dismissal – the ultimate sanction – is not favored as a first corrective measure. *See, e.g.,*
12 *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1022-23 (D.C. Cir. 2004) (suggesting
13 alternative sanctions like fines or paying the appellee's attorney's fees). Indeed, as a general matter,
14 dismissal tends to only be appropriate upon a showing of the appellant's bad faith or prejudice to the
15 appellee. *See id.* Abreu has made no showing of prejudice in support of his motion to dismiss, and
16 any evidence of Lona's bad faith has not been developed.

17 The court therefore grants Lona's motion for an extension of time. Since many months have
18 passed since Lona designated the record and identified the issues she seeks to appeal, the court
19 extends the time for her to file her appellate brief to February 6, 2009. An opposition brief (and any
20 cross-appeal) from Abreu will be due on February 27, 2009. Any reply brief (and opposition to any
21 cross-appeal) will be due on March 11. Any reply to the opposition to any cross-appeal will be due
22 on March 25. If the court deems a hearing necessary, it will schedule one. A failure by Lona to file
23 her appellate brief by February 6 will result in the court issuing an order to show cause why the
24 appeal should not be dismissed for want of prosecution.

25
26 DATED: 1/21/2009



RONALD M. WHYTE
United States District Judge

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21 **Honorable Roger L. Efremsky**

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26 **Dated:** 1/21/2009

TSF
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